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Supreme Court of the United States

OCTOBER TERM, 1927

No. 34

LOUIS K. LIGGETT COMPANY, Appellant,

v.

THE HONORABLE THOMAS J. BALDRIGE, Attorney General of the Commonwealth of Pennsylvania; CHARLES C. CAMPBELL, CHARLES F. KRAMER, ET AL., ETC., ET AL.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it Please the Court:

The undersigned, as counsel for May Drug Company, a Pennsylvania corporation, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

CHARLES H. SACHS,
LOUIS CAPLAN,
Counsel for May Drug Company
as Amicus Curiae.

328 Frick Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 209-213 GRANT STREET, PITTSBURGH, PA.

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THE HONORABLE THOMAS J. BALDRIGE, Attorney General of the Commonwealth of Pennsylvania; CHARLES C. CAMPBELL, CHARLES F. KRAMER, ET AL., ETC., ET AL.

BRIEF OF MAY DRUG COMPANY AS AMICUS CURIAE.

I.

Preliminary Statement.

This brief is filed on behalf of the May Drug Company, a Pennsylvania corporation, which is interested in the questions involved in this appeal, although not a party to it. This company has been engaged for twenty-two years and upwards in operating retail drug stores in the city of Pittsburgh, Pennsylvania, and in the territory adjacent thereto. It owns seventeen stores, and has one building devoted to warehouse and office purposes. Each of its stores is under the management and personal supervision of a duly registered phramacist, each of said pharmacists having personal supervision of not more than one store.

This corporation is affected by the statute in question in precisely the same manner as Louis K. Liggett Com-

pany, appellant, and its rights will be determined by the decision of this case. Its capital stock is not owned by pharmacists licensed by the State of Pennsylvania, and if the statute here involved is sustained as valid, this company will be unable to extend and further develop its business, and the value of its assets will be greatly impaired.

II.

Argument.

THE STATUTE BEFORE THE COURT IN THIS CASE IS A TRADE AND NOT A POLICE REGULATION; IS UNREASONABLE AND ARBITRARY, AND VIOLATES THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The possibilities of legislation of the character of the Act of Assembly of the Commonwealth of Pennsylvania, approved May 13, 1927, P. L. 1009, "regulating the ownership of pharmacies and drug stores", are tremendous. If such laws are valid, then a method has been found for preventing corporations from engaging in many lines of business, perhaps all lines of business, in which they are at present engaged.

Let us take, for illustration, the baking business. At present, it is carried on by many corporations with large capital. The first step to put corporations out of that business would be to enact a law forbidding any person from following the trade of a baker, from mixing batches of dough, or performing any of the operations of a baker, unless he had obtained a license from a board established by law to pass upon his skill and fitness. It could not be questioned that such legislation would have a substantial relation to the public health, and would be valid. The next step would be to pass an act similar to the one here in-

volved, declaring that all bakeries shall be owned by licensed bakers. The fact that the statute may, like this one, countenance ownership by corporations, all of the members of which are licensed bakers, does not detract from the fact that the ownership of bakeries is forbidden to anyone but licensed bakers. For what sort of a corporation would it be, if the ownership of its stock was limited to licensed bakers? Would it be possible to have corporations with capital stock running into millions of dollars, if such a comparatively small class of people could acquire its stock? Those who profess to be lovers of the "proletariat", might consider this not an undesirable effect, but that is not the policy of the law.

From the baking business we go to the grocery business. It is certainly as important to the health of the citizen that he should be safeguarded against putting any deleterious food substances in his stomach, as medicinal preparations. An argument may be made by those who would like to drive corporations out of the grocery business, that no one should be permitted to sell, vend or dispose of food stuffs, unless he was licensed by the state as a grocer, after he had shown that he possessed a knowledge of the principles of wholesome foods. If a sufficient number of people interested in getting such legislation through would get together, they might conceivably apply sufficient pressure in one way or another on a legislature to pass such an act. The courts might be constrained to hold such an enactment to be a valid exercise of the police power. "The state has wide discretion in selecting things for regulation," said the Supreme Court of the United States, in *Weaver v. Palmer Bros Co.*, 270 U. S. 402, the Pennsylvania mattress case, although it held, in that case, that it had exceeded even that wide discretion. Then would follow a statute, like this one, prohibiting the *ownership* of grocery stores by any one but "licensed grocers."

We have valid statutes prohibiting any one except licensed mechanics from following the *trade* of plumbing. It might not be a far stretch to consider that the building of automobiles had involved in it public interest and safety, and that to protect the lives and health of the people from unsafe and improperly built automobiles, no mechanic should be allowed to build, or work on, an automobile, unless he obtained a license. That accomplished, another act would be passed prohibiting any but licensed mechanics from owning, in whole or in part, an automobile factory.

So we can go on forbidding to corporations most lines of *business*, which they are at present engaged in carrying on, and which they have developed to a point of perfection and magnitude which individuals, acting separately, or in small groups, would not have been able to attain. It could be defended just as logically as this act can be defended.

That we are not indulging in groundless fears that this kind of legislation, if permitted to stand, would be made use of to create monopolies in many lines of business, is evident from what has happened. In the state of Washington, a statute was enacted forbidding any person other than a licensed dentist from owning a dental office. In the state of New York, a somewhat similar law was passed relating to the undertaking business, and another one with reference to the plumbing business. They were all declared invalid: *State v. Brown*, 37 Wash. 97; *People v. Ringe*, 197 N. Y. 143; *Schnaier v. Navarre Hotel Co.*, 182 N. Y. 83.

Of course, this Act does not *expressly* prohibit corporate ownership, but its effect to accomplish this is just as plain as if it came out openly and honestly under that banner. What sort of corporations would we have, if they were limited to such special and privileged classes? All the benefits that we have received during the past hundred years through the development and growth of corporations, the

power to produce, economically and at low prices, articles that would otherwise be within the reach of the wealthy few, would disappear. But thirty years ago, a coach was the possession of only the wealthy. Today, an automobile, which is so far superior to the coach that it has rendered the latter obsolete, and a curiosity, is owned by millions of workingmen. To sustain this class of legislation, would be turning back the course of progress hundreds of years.

This statute is a puny attempt to go back to industrial methods that we have outgrown, and to which we cannot be made to return by legislative fiats. It is as futile to attempt to nullify the progress we have made, as it would be to declare, by act of legislature, that we must go back to candle light, and horse drawn vehicles.

This is not a police, but a trade regulation, and while plausibility may suggest some far fetched excuse for contending that the public health is concerned in who owns some of the shares in a drug store where a prescription is compounded by a man duly licensed for that purpose, it cannot be denied by those who have a regard for the truth, that the real purpose in back of this legislation is to forbid the carrying on the business of a drug store by corporations, and to grant an exclusive monopoly thereof to apothecaries. It is true that they did not attempt the bold thing of putting the corporations, *at present in it*, out of business entirely. They put in an exception allowing corporations now lawfully conducting stores to continue to conduct these same stores, but not to operate new ones. First, they want to put the present act on a safe basis, to have the court declare it constitutional, and then they will pass an act forbidding any corporation from carrying on that business, no matter how long they have been in it, and thus destroy them.

And, logically, why should they not pass such an act later? Is the public health less likely to be impaired by

the Liggett Company, in its operation of drug store A, which it has conducted in Philadelphia for 20 years, let us say, than of drug store B, which it opens in 1928? The distinction is without justification or merit. With all the wisdom that is supposed to be back of a legislature's determinations, as embodied in its official enactments, there is no reason in holding one to be proper, and therefore allowed to continue, and the other improper, and not permitted to be started.

Here is where corporations who have large sums invested in this business find themselves. If it were not for the gracious exception in the following language: "Except that any corporation • • • which *at* the time of the passage of this act still owns and conducts a registered pharmacy or pharmacies or drug store or drug stores • • • may continue to own and conduct the same, but no other or additional pharmacies or drug stores shall be established, owned or conducted by such corporation • • • unless all the members, etc.", they would suffer a confiscation, a destruction of a lawful business, in which considerable capital, millions of dollars, are invested, a business which was started under the protection of the law, and which was carried on by persons scientifically trained and legally authorized to do so, because of a matter which has no relation whatever to the public health or interest, namely, the *ownership of its stock*. And yet, if the principle enunciated by the Supreme Court of Pennsylvania in the case of *Com. v. Zacharias*, 181 Pa. 126, (altho, it was not necessary to a decision of that case), is still logical, and holds good, the exception is bad.

There are other exceptions in the act which are bad, the proviso upon a proviso:

"PROVIDED That nothing in this section shall be construed to prevent or affect the ownership by other

> than a registered pharmacist of a store or stores wherein the sale or manufacture of drugs or medicines is limited to proprietary medicines and commonly used household drugs PROVIDED, such commonly used household drugs are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers or wholesale druggists." (Capitals ours).

In other words, if a "wholesale grocer" puts whatever "drugs or medicines" it pleased in a package, it is lawful for anybody to own the store in which it was sold, whether the wholesale grocer or his employes, were qualified to put up medicines or not, but, if a company of bakers, printers, or carpenters put up these original package goods, then, it takes a registered pharmacist to own the store in which it is sold. We cannot discover any reason for the license to sell medicines to the public, put up by wholesale, but not retail, grocers, if it contained in a closed package, unless it be one on a par with the reason given by the man who made the claim that bologna sausage is the cleanest food. Asked why, he replied: "Because it is tied at both ends".

There is, manifestly, no more reason for the Act, as a whole, than for its exceptions.

This class of legislation, which consists of *ipse dixits* like "Every pharmacy or drug store shall be owned only by a licensed pharmacist" is so new and untried that it is interesting to speculate on what would probably be its effect on those responsible for its enactment, if it should be sustained as valid. Let us suppose that in the flush of victory, a number of licensed pharmacists band together, obtain a charter, and start to operate a drug store or drug stores. One or all of them die, and their estates attempt to sell their stock certificates,—the stores themselves they

cannot sell. Their market is limited, firstly, because apothecaries, druggists, may not be as a class, men with ready money, and, secondly, because those that have some money have lived long enough, under the operation of the law, to see how the estates of their deceased friends have been caught, pinched, by the very act they thought was going to do so much for them, and are therefore unwilling to increase their investments in property of such doubtful value. They have enough in the store or stores which they already own. They cannot build them up for their families, an ambition which leads many men to expand their businesses, and to make plans for their conduct, even after their death. It is a new kind of property which they have created in their desire for a monopoly, something for which there is no precedent in the economic system of any civilization or people, property which is not inheritable as such, and which must be thrown on the market and sold, if a buyer can be found for it.

The difficulties and impossibilities of such a statute are manifest. Suppose that one of the stockholders in a corporation, all of the members of which are licensed pharmacists, should transfer his stock to one who is not a licensed pharmacist, or should, for personal misconduct, lose his license, what will be the plight of the corporation, and its innocent stockholders? Shall they, law abiding one day, be transmuted into criminals the next day, because of something for which they are not responsible? Must the corporation go out of business? And what is the nature of its capital stock? May it be reached on an execution, or, is the money invested in such stock safe from levy by creditors? If it may be sold on an execution, what rights does the purchaser get?

What fanciful reason can be given for such a statute? The stockholders of a corporation who are licensed phar-

macists are not obliged by the law to participate in the management or supervision of the stores. They may be absentee owners, showing interest only in the question of whether the store is making money, and whether they are likely to get dividends on their stock. The interests of the public are already carefully safeguarded by the provisions of the Act of May 17, 1917, P. L. 208, which make it unlawful to sell drugs, medicines or poisons, at retail or compound physicians prescriptions, except in compliance with that act, and which forbids any one but a registered pharmacist to have charge of a pharmacy, and does not permit a registered pharmacist to have personal supervision of more than one pharmacy at the same time. The law provides for the quality and strength of medicinal preparations made by manufacturing chemists, so that the quality of the drugs available for purchase by retail druggists is settled. What, then, is left on which the solicitude of the legislature may operate? The general notions of honesty and fair dealing of the owners? But what rational ground is there for the assumption that the standards of honesty possessed by registered pharmacists are higher than those of other citizens, so that it would probably be injurious to public welfare to allow citizens generally to own stock in corporations carrying on the drug business?

From every standpoint, from a consideration of everybody's interest, this act is, and should be declared, unconstitutional.

Respectfully submitted,

CHARLES H. SACHS,
LOUIS CAPLAN,
Attorneys for May Drug Company as Amicus Curiae.